IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 9TH NOVEMBER 2006 / 18TH KARTHIKA 1928

WP(C).No. 1947 of 2005(F)

PETITIONER:
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1. P.N.KRISHNANKUTTY,
MANAGING PARTNER, CHITRA STUDIO, P.O.ROAD,
KOTTAYAM.

2. JAYA KESAVAN, MANAGING PARTNER,
CHITRA COLOUR LAB, P.O.ROAD, KOTTAYAM.

BY ADV. SRI.PHILIP T.VARGHESE
SRI.THOMAS T.VARGHESE

RESPONDENTS:

P.ANNAMMA STEPHEN,
PULIMOOTTIL HOUSE, BHARANGANAM P.O.,
KOTTAYAM.

BY ADV. SRI.C.M.TOMY
SRI.MATHEW SKARIA
SRI.SUJESH J.MATHEW

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 09/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Thottathil B. Radhakrishnan, J.

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W.P.(C)No.1947 of 2005

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Dated this the 9th day of November, 2006.

JUDGMENT

This writ petition is filed challenging Ext.P4 award of the Industrial Tribunal rendered on an adjudication by the Government of Kerala as per G.O.Rt.No.421/2001/LBR dated 5-2-2001. The issue referred for adjudication is as follows:

> "Whether the denial of employment to the accountant Smt.Annamma Stephen by the management is justifiable. If not, what is the relief she is entitled to?"

2. The writ petitioners are two managements, meaning thereby two separate partnerships. Going by the written statement filed by the writ petitioners before the Tribunal, Chithra Studio and Chithra Colour Lab are two separate partnerships, functioning independently, with separate sales tax registration, income tax assessment etc.; the two establishments are functioning in the same premises; the workman

Smt.Annamma Stephen was employed in both the establishments as a part time employee and her emoluments were paid by the two firms separately; the work in both the establishments got accumulated with the passage of time and the managements thought it proper to computerize the accounts leading the workman, who was dealing with accounts being directed to learn to handle computer; since she could not come up with the needful even on being offered by the management to meet the expenses for learning computer operation, both the managements appointed another part time clerk and the workman was directed to work in the reception counter, the only suitable place that was available to her, she, being, not a computer literate and that the workman abandoned the employment on 4-7-2000.

3. Alleging that on 4-7-2000, both the establishments denied employment to her, the workman made a representation on 5-7-2000 to the managements and complained on 7-7-2000 to the District Labour Officer, about the alleged denial of employment. This led to the reference of the dispute in question leading

to the impugned Ext.P4 award. Before the Tribunal, the establishments, as already noticed, admitted having employed her. The dispute was as to whether it was a case of denial of employment as alleged by the workman or whether it was a case where she voluntarily abandoned employment.

4. After hearing the oral evidence of the workman as W.W.1, the representations of the managements as M.W.1, M.W.2 and M.W.3, the person, who was newly recruited to handle computers, the Tribunal held that the management had denied employment to the workman with effect from 4-7-2000 and having regard to the immediate action taken by her by representing to the management on 5-7-2000 and followed by a complaint on 7-7-2000, the case of abandonment pleaded by the management is not made out. It further held that the provisions of Section 25-F of the Industrial Disputes Act, 1947 (the "Act", for short) were not complied with and hence it was not a case of retrenchment and still further, that the management had not even pleaded that there was any retrenchment. Finding so, the Tribunal

ordered reinstatement of the workman with backwages and all other benefits.

5. In this writ petition, the arguments advanced, if at all, on the merits of the award, in so far as it directs reinstatement, rested on the realm of appreciation of evidence. It was neither urged nor am I satisfied that the findings in the award leading to order for reinstatement is perverse or unavailable on the materials on record, warranting interference in writ jurisdiction.

6. The main thrust of the arguments advanced on behalf of the management was against the direction awarding backwages. It was urged that the Tribunal ought not to have granted any backwages, particularly, when it was not proved by the workman that she was out of employment and that she had not earned any amount while she was out of employment pursuant to the denial of employment by the managements on 4-7-2000.

7. Per contra, the learned counsel for the

workman urged that even in Ext.P2 written statement, there was no contention for the management that the workman was employed gainfully after 4-7-2000.

8. In answering this issue, before proceeding to the facts of the case, it is appropriate to notice the relevant law on the point.

In **Hindustan Tin Works (P) Ltd. v. Employees [(1979) 2 S.C.C.80]**, it was held as follows:

> "11. In the very nature of things there cannot be a straitjacket formula for awarding relief of backwages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full backwages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the revelant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour.

> It is not to be arbitrary, vague and fanciful but legal and regular (see Susannah Sharp v. Wakefield (1891 AC 173 at p.179).
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> (emphasis supplied)

In **P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar [(2001) 2 S.C.C.54]** the Apex Court held that payment of backwages having a discretionary element involved in it, has to be dealt with, in the facts and circumstances of each case and no straitjacket formula can be evolved, though, however, there is statutory sanction to direct payment of backwages in its entirety.

Referring to the aforesaid decisions, in **Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya [(2002)6 S.C.C. 41]** it was held as follows:

> "11. Under Section 11-A as amended in 1971, the Industrial Tribunal is statutorily mandated, while setting aside the order of discharge or dismissal and directing reinstatement of the workman to consider the terms and conditions, subject to which the relief should be granted or to give such other relief to the workman

> including the award of any other punishment in lieu of the discharge or dismissal, as the circumstances of the case may require. The section is couched in wide and comprehensive terms. It vests a wide discretion in the Tribunal in the matter of awarding proper punishment and also in the matter of the terms and conditions on which reinstatement of the workman should be ordered. It necessarily follows that the Tribunal is duty-bound to consider whether in the circumstances of the case, backwages have to be awarded and if so, to what extent."

In **Allahabad Jal Sansthan v. Daya Shankar Rai and another [(2005) 5 S.C.C.124]** after noticing different precedents governing the field, it was ultimately stated as follows:

> "We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full backwages was the usual result. But now with the passage of time, it has come to be realised that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period during which he apparently contributed little or nothing at all, for a period that was spent uproductively, while the workman is being compelled to go back to a situation which prevailed many years ago

> when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at."

> In **General Manager, Haryana Roadways v. Rudhan Singh [(2005) 5 S.C.C.591]** it was held that a person who was found to have worked for less than one year was not entitled to payment of backwages.

> In **M.L.Binjolkar v. State of M.P. [(2005) 6 S.C.C. 224]** the Apex Court dealt with a case of compulsory retirement and held that full backwages are no longer a natural corollary of an order of reinstatement and that it would depend upon several factors and the court has to weigh pros and cons of each case and take a pragmatic view. The Apex Court thereby confirmed the decision of the High Court reducing backwages to 50% though the High Court had not subsequently dealt with the question as to what would be the appropriate quantum.

9. In view of the aforesaid, what needs to be done in this case is to find out as to what would be the backwages, if any, that would be payable to the workman having regard to the facts of the case, in an endeavour to do justice to the parties.

10. In Ext.P1 claim statement, the workman who,

going by the records, appears to have been around 57 years of age, had pleaded, among other things that, she is a spinster with no close relatives and that her parents have died years ago and she has no family assets or income and that the employment under the management and the wages earned by her are the only means of livelihood. She stated that the management should not have behaved rudely by denying employment to a female workman, who had been discharging her duties with utmost devotion. She pleaded before the Tribunal of having suffered mental agony and strain. She further contended that the tears of the workman should not have been brought as the direct result of the newly purchased computer. In Ext.P2 written statement, except from stating that after voluntary abandonment she is not entitled for reinstatement with or without backwages, there was no allegation levelled by the management to the effect that she was employed gainfully after 4-7-2000 and that she is not therefore entitled to any amount as backwages. The impugned Ext.P4 award also does not reflect that any argument was addressed on either side, on the question of

backwages. In that context, the Tribunal passed the award for reinstatement coupled with the order for backwages.

11. In this writ petition by the management, there is no plea that the workman was gainfully employed elsewhere after 4-7-2000 and that she is not entitled to any backwages. All that is found is Ground-H, to the effect that the direction for payment of backwages is, at any rate, unjust and unwarranted.

12. In the backdrop of the aforesaid facts, the materials reflect that the workman was employed for a continuous period from 20-6-1991 to 4-7-2000. She had been working for both the establishments, which, apparently are sister concerns, though they are two partnerships. The nature of activities in the said establishments is such that she could be accommodated by them jointly. I say so because even in the writ petition, there is an averment that pursuant to the impugned Ext.P4 award, she was asked to join duty however that she did not, on the pretext that she was

ill.

13. As already noticed, the claim was made by her on 5-7-2000 to the management following the alleged denial of employment on 4-7-2000. On 7-7-2000, she promptly complained to the District Labour Officer resulting in the reference being made to the Tribunal on 5-2-2001. Upon the reference, she filed the claim statement in May, 2001 and the managements filed a joint written statement in November, 2001. The impugned Ext.P4 award was passed on 11-2-2004 after recording the evidence of four witnesses, including the workman, and taking on record 12 exhibits on the side of the workman.

14. In the counter affidavit filed to this writ petition, the workman denied the accusation that she did not work on being offered employment after the impugned award. She accused the management for refusing employment to her when she reported for joining duty. She filed I.A.No.9624 of 2005 invoking

Section 17-B of the Act. In opposition to that petition, the management contended that they were willing to permit her to rejoin duty, but she cannot be permitted to work as accountant. On 17-11-2000, without prejudice to the contentions in this writ petition, it was directed that if the workman appears before the management on 1-12-2005, she will be employed by the management on the same terms as to engagement, however that, the management will be at liberty to give her such posting as the management would reasonably deem fit, having regard to her qualifications and experience.

15. Having regard to what is stated above, I am inclined to take the view that no materials were placed on record by way of any assertion by the management, or otherwise, that the workman was employed gainfully after 4-7-2000 till the award was passed. However, having regard to the fact that she could not have been employed as an accountant after the management decided to computerize their establishments, it is inappropriate to order the management to pay full

backwages. The proceedings before the Tribunal was not dragged on for any fault that could be attributed to her or to the management. Under such circumstances, I am of the view that ends of justice would have been satisfied if the Tribunal had ordered that the workman is entitled to only 50% of the backwages. To that extent, the impugned award is vitiated, being contrary to the law laid in the precedents referred to above.

In the result, this writ petition is partly allowed quashing Ext.P4 award to the extent it directs payment of full backwages and it is directed that the respondent workman will be entitled to 50% of the backwages in terms of Ext.P4 award. No costs.

Thottathil B.Radhakrishnan,
Judge.

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